STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DONALD C. RICHARDSON

Defendant-Appellant.
_____/

Supreme Court No. 141752

Court of Appeals No. 291617

Lower Court No. 08-013456-FC

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141752

"SUPPLEMENTAL BRIEF"
to
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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STATEMENT OF JURISDICTION

Defendant-Appellant asserts that jurisdiction is appropriate pursuant to MCR 7.302.

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Trial Court made no answer.

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee answers, "No."

II. **DID MR. RICHARDSON NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL DUE TO COUNSEL'S FAILURE TO OBJECT TO ERRONEOUS AND HIGHLY PREJUDICIAL JURY INSTRUCTIONS?**

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee would answer, "No."

SUPPLEMENTAL STATEMENT OF FACTS

Defendant-Appellant Donald C. Richardson was convicted of two counts of assault with intent to do great bodily harm less than murder (as lesser offenses to assault with intent to murder) and felony firearm. These convictions came at the conclusion of a jury trial conducted in January of 2009 in the Wayne County Circuit Court, Judge Thomas E. Jackson presiding. On February 26, 2009, Mr. Richardson was sentenced to 36 months to 120 months for each assault conviction, to be served concurrently to each other and consecutively to the mandatory term of 2 years in prison for the felony firearm charge. Mr. Richardson was represented at trial and sentencing by attorney Charles D. Lusby.

The Michigan Court of Appeals summarized the facts of this case in its Opinion:

> This case arises out of a shooting that occurred on September 25, 2008, outside a residence on Forrer Street in Detroit. Defendant admitted at trial that he shot the victims, Brandy Abrams and Dennis Dinwiddie, but he claimed that he acted in self-defense.
>
> On the afternoon of the incident, defendant's wife and several other people were throwing eggs and rocks at each other outside of defendant's home. Defendant's wife swore and made threats to various people at the scene, including to her neighbor, Teresa Moore. Ms. Abrams's son was involved in the disturbance and, when Ms. Abrams drove up to defendant's house, she verbally confronted defendant's wife. The women exchanged vulgar remarks and threats and Ms. Abrams eventually picked up a baseball bat. Though it appears Ms. Abrams stood on the ground while defendant and his wife stayed on their porch or inside their front door, Ms. Abrams conceded at trial that, during the confrontation, she hit defendant's porch railing and screen door with the bat.
>
> Mr. Dinwiddie testified that he was drinking a beer at Ms. Moore's house next door and he witnessed the argument between Ms. Abrams and defendant's wife. According to Mr. Dinwiddie, he walked up to Ms. Abrams to lead her back to Ms. Moore's house so that she would not get in trouble and so that no one would get hurt. Ms. Abrams testified that Mr. Dinwiddie tried to talk to defendant, but defendant suddenly said he was "tired of this shit," he pulled out a gun, and started shooting. Mr. Dinwiddie said the first bullet felt like a dagger in his back. In total, Ms. Abrams sustained four gunshot wounds and Mr. Dinwiddie sustained two gunshot wounds. Thereafter, defendant reloaded his revolver and waited on

his porch until the police and EMS arrived.

> With regard to defendant's claim of self-defense, defendant presented evidence that he has a reputation for being a law-abiding and peaceful person. He testified on his own behalf at trial and claimed that he was provoked by Ms. Abrams when she broke his glass screen door with the baseball bat and hit him in the chest with the baseball bat. Defendant testified that, after this happened, he was afraid that Ms. Abrams would seriously hurt or kill his wife or himself and that he therefore felt it necessary to shoot. Defendant also saw Mr. Dinwiddie running toward him but could not see if he was carrying anything in his hand. Defendant testified that friends or relatives of his neighbor, Ms. Moore, have acted in a threatening manner toward him in the past, but the police provided him no assistance. Accordingly, defendant asserted that he honestly and reasonably believed he and his family were in imminent danger of severe injury or death.

People v Richardson, Michigan Court of Appeals Docket No. 291617, pages 1-2 (July 27, 2010).

The original brief on appeal was filed by attorney William F. Branch. It was attached to Defendant-Appellant's *pro per* application for leave to appeal to this Court that was filed on September 15, 2010. That brief contains a more comprehensive "Statement of Facts" which is incorporated herein and supplemented as follows:

The initial jury instructions were given at the end of the second full day of trial. (Beginning at T III, 149). The trial court instructed the jurors on the law involved in the case, including, in relevant part, broad concepts about self defense and the duty to retreat:

> Now the Defendant claims that he acted lawfully to defend -- that he acted in lawful self-defense to defend himself and/or his family, wife and family members. A person has the right to use force, to even take a life to defend himself or someone else under certain circumstances. If a person acts in lawful self-defense of another or himself, his or her actions are justified and he or she is not guilty of the crimes charged.
>
> You should consider all of the evidence and use the following rules to decide whether the defendant acted in lawful self-defense of himself or of another. Remember to judge the defendant's conduct according to how the circumstances appeared to him at the time he acted.

First, at the time he acted the Defendant must not have been engaged in the commission of a crime.

Second, when he acted, the Defendant must have honestly and reasonably believed that he or his family member were in danger of being killed and/or seriously injured. If his belief is honest and reasonable, he can act at once to defend them or defend himself even if it turns out later that the Defendant was wrong about how much danger he was in.

Third, if the Defendant was only afraid that the other person or he would receive a minor injury, then he was not justified in killing or seriously injuring the attacker.

The Defendant must have been afraid that the family member and/or himself could have been killed and/or seriously injured. When you decide if he was so afraid, you should consider all of the circumstances, the condition of the people involved, including relative strength, whether the other person was armed with a dangerous weapon, had some other means of injuring the defendant or the other person, the nature of the other persons attack or threat, whether the defendant knew about any previous violent acts or threats made by the attacker.

Fourth, at the time he acted, the Defendant must have honestly and reasonably believed that what he did was immediately necessary.

Under the law, a person may only use as much force as he or she thinks is needed at the time to protect himself or the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendant knew about any other way of protecting himself or protecting the other person. But you may also consider how the excitement of the moment affected the choice the Defendant made.

The Defendant does not have to prove that he acted in self-defense of himself or the other person. Instead, the prosecutor must prove beyond a reasonable doubt that the Defendant did not act in defense of himself or the other person.

A person who can – a person can use deadly force and self-defense only where it is necessary to do so. If the Defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the Defendant honestly and reasonably believed he needed to use deadly force and self-defense.

However, a person is never required to retreat if attacked in his or her own home, nor if the person reasonably believed that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden fear [sic] and violent attack.

Further, a person is not required to retreat if the person is not engaged in the commission of a crime at the time deadly force is used, and has a legal right to be where the person is at that time, and has a honest and reasonable belief that the use of deadly force

is necessary to prevent imminent death, great bodily harm of a person or another, himself, or another.

A defendant who is attacked by more than one person or by one person encouraging an attacker has the right to act in self-defense against all of them. However, before using deadly force against one of the attackers, the Defendant must have honestly and reasonably believed that he is in imminent danger and death and great bodily harm by that particular person.

A person can use deadly force in self-defense only where it is necessary to do so – excuse me. I was about to repeat something I already said.

If a person is assaulted – if the Defendant is assaulted in his own home, if someone forcefully entered the Defendant's home, the Defendant did not have to try to retreat and get away. Under those circumstances, the Defendant could stand his ground and resist the attack with as much force as he honestly and reasonably believed necessary at the time he needed to protect himself.

(T III, 166-169).

These instructions represent concepts from CJI2d 7.15 "Use of Deadly Force in Self-Defense" (for acts Occurring On or After October 1, 2006) CJI2d 7.22, "Use of Non-Deadly Force in Self-Defense or Defense of Others (for acts occurring on or after October 1, 2006), CJI2d 7.20 "Burden of Proof - Self-Defense, CJI2d 7.16 "Duty to Retreat to Avoid Using Deadly Force" (for acts occurring on or after October 1, 2006), CJI2d 7.24 "Self-Defense Against Persons Acting in Concert" (for acts occurring on or after October 1, 2006), and CJI 2d 7.17 "No Duty to Retreat While in Own Dwelling" (for acts occurring before October 1, 2006).

Neither the prosecution nor the defense had any objection to these instructions. (T III, 174).

The jurors began deliberating at 3:34 p.m. on January 26, 2009. (T III, 177).

During the afternoon of January 27, 2009, the jurors requested access to exhibits and testimony, and asked "What is considered the Defendant's home to understand self-defense?" (T IV, 3). To answer the question, the Court and the parties discussed the amendments to both the law and the jury instructions on self defense, with counsel explaining that "a person's home

would include the curtilage of the dwelling." (T IV, 4). Counsel asked for an instruction explaining the concept of curtilage. *Id.* The Court believed that the instructions provided to the jurors were an accurate statement of the law after the October 1, 2006 amendments. *Id.* at 5. However, the Court realized that CJI2d 7.17 had been "deleted", and referred to CJI 2.d 7.16. *Id.* at 5-6. The focus of the Court's explanation was on the difference between the definition of "dwelling" and "home." *Id.* at 6. The Court decided to re-read CJI2d 7.16 in its entirety and provide a definition of "dwelling" considering the definition provided in MCL §768.21c. *Id.* at 6-7 The defense urged the court to include the concept of curtilage and appurtenance to the dwelling in that definition. *Id.* at 7-8, 9. The defense confirmed the Court's inquiry that it was referring to "something like a porch or some other building or something attached to it?" (*Id.* at 9).

The court reviewed the law, including MCL §780.981, MCL §780.982, MCL §768.21c, the jury instructions as set forth in CJI 2d 7.16, and *People v Riddle*, 467 Mich 116 (2002), but expressed some confusion about the concepts:

> [by the Court, out of the presence of the jury]: Now, I think what's confusing us, and maybe confusing me, maybe I should say, is the part about – and I think that was in one of the new ones, they still use the when a person can or cannot retreat, right? They said that there's a duty to retreat, but I think that the part about whether or not they're in their home or not, is that part – has that one been changed or modified? That's what I was kind of thinking is partly confusing here. I think they still have some of that language in one of the instructions that I gave, and that's what I was trying to find on the break here.
>
> MR. LUSBY [defense counsel]: If I may, Judge?
>
> THE COURT: 7.15, is that the one you are talking about?
>
> MR. LUSBY: I was –
>
> THE COURT: Go ahead.

MR. LUSBY: It seems to me, your Honor, that 768.21c, paragraph one says that the duty to retreat before using deadly force is not required if an individual is in [his] or her own dwelling or within the curtilage of that dwelling.

THE COURT: That curtilage, that is not in there. Where do you get curtilage?

MR. LUSBY: I just printed it out. It's right here. It is in the statute, [MCL §768.21c].

THE COURT: Okay. I see it. You said that the one we were talking about earlier?

MR. LUSBY: Yes, sir, it's right in the statute. Over the break I had downloaded it from the – on the computer.

THE COURT: Yeah, okay.

MR. LUSBY: In addition to that, your Honor, paragraph two says as used in this section, dwelling means a structure or shelter that is used permanently or temporarily as a place of abode including an appurtenant structure attached to that structure or shelter.

THE COURT: Very well. I see what you are talking about. I'll give that.

Also, I think based on their note here, I probably have to tell them that they can forget about the concept of home in that sense except for how it's viewed in the definitions and the statute itself. That's probably what they are hung up on when they talk about home, being that building that one walks through a door and you're inside and at home, as they say. But I guess this is more expansive in terms of that includes a dwelling.

I'll do that and just remind them of the general rules of self-defense. We'll go with that.

MR. LUSBY: Judge, before they come in, I have a request. Trying to foresee an additional question from the jury – I'm attempting here to foresee a possible question from the jury. They might then want to know what a curtilage is. I'm submitting that the only thing I was able to find as to definition of curtilage was Blacks Law Dictionary.

THE COURT: Hold on a minute. I think I have a copy of Blacks Law Dictionary.

Go ahead.

> MR. LUSBY: My – of course I don't have it with me, but is that the curtilage would include the area around the dwelling, immediately around the dwelling, especially if it's enclosed, whether it's enclosed or not, and then for some purposes, as in narcotics cases, the curtilage could also include other buildings, farms, etc. We're not dealing with that here. But I'm submitting to the court that curtilage would be the porch certainly and the yard certainly would be within the curtilage of the dwelling.
>
> THE COURT: See the definition they have here. The only thing they have in Blacks that I see here, Blacks Law Dictionary Seventh edition, the land or yard adjoining a house usually within an enclosure, all right. That [sic] sufficient?
>
> MR. LUSBY: For me, for the defense.

(T IV, 11-14).

The Court answered the jury's question about the definition of "home" with the following instruction:

> There is a definition, and we can just sort of put at rest just the home word right now. There is – the statute says that in cases of self-defense the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in her own home or dwelling or within the curtilage of that dwelling. And curtilage, as a general definition, meaning land or yard adjoining a house usually within an enclosure. And also, as used in this section, dwelling means a structure or shelter that is used permanently or temporarily as a place of abode and including an appurtenant structure attached to that structure, meaning something that is attached to that structure or shelter also. Sometimes people may have sheds or something like that, enclosed porches, something along that line. []

(T IV, 16-17; *see also* T IV 19 "[F]orget about the concept of the home the way I use that and use it as I have defined for you.").

The court also reinstructed on the concept of self defense, consistent with CJI2d 7.15 "Use of Deadly Force in Self-Defense" (for acts occurring on or after October 1, 2006). (T IV, 18-19). The record does not reflect that the jury was reinstructed on the duty to retreat on this day of deliberations.

During the morning of January 29, 2009, the jury reported being "hung". (T V, 3). The court provided additional instructions about the law, and observed some previous concern by the jurors about self defense. (T V, 4-6). The court suggested that the jurors review the law on self-defense "as kind of, like, a checklist":

> Now, understand what I said to you and the instruction I gave to you about that. Some of the concerns is [sic] one of the notes that you sent out about some of the question [sic] about self-defense.
>
> Remember that self-defense, a lawful self-defense is justified if the Defendant honestly and reasonably believed that he is in [imminent] danger of death or great bodily harm if necessary for him to use deadly force. In the instruction I said, a person has the right to use force or even take a life to defend himself or someone else under certain circumstances. So, that means that you have to look at the facts and make a determination as to what those circumstances are and how they fit into the law of self-defense.
>
> You may look at it as kind of, like, a checklist. And if a person acts in lawful self-defense for himself or another, then, of course, those actions are justified and the person is not guilty of the crime. But the instruction I gave you, and I remind you, you should consider all the evidence and use the following rules to decide[] if the Defendant acted in lawful self-defense of another or himself, and remember to judge his conduct according to how the circumstances appeared to him at the time that he acted.
>
> Now, the mere fact of someone saying I acted in self-defense, you have to make the analysis as to whether or not those facts fit that. And you have to look at all those facts and circumstances in making that determination. The law generally recognizes that the use of self-defense has to be done in limited circumstances. Again, you can look at how the situation appeared to the Defendant at the time. So, you have to make an objective analysis of all of the facts and all of the circumstances.
>
> Basically the law says, as I gave it to you, is that a person must avoid using deadly force if one can do so without causing harm to one's self or someone else. But in order to justify using that deadly force, there has to be some circumstances that are there. The law in general says a person has the duty to retreat except in some circumstances. We talked about that the other day, about how if a person may be – we used the home, dwelling, curtilage and so forth. But understand again, someone can actually be in their home, their dwelling and not be subject to self-defense unless those circumstances them self [sic] justify that.

> I want to make sure that no one is under the impression, some people that have that, if someone comes to someone's house or on their property and if they kill or use deadly force automatically that justifies and that's self-defense. The law is that you have to follow the rules of law and make an analysis as to whether or not those circumstances are such that fit or justify self-defense. And, again, I gave you those, you had them and you looked at them.[]

(T V, 6-8).

The Court reinstructed the jury on the Use of Deadly Force in Self Defense, largely consistent with CJI2d 7.15, the burden of proof, consistent with CJI 2d 7.20, and this time also reinstructed on the Duty to Retreat as provided in CJI2d 7.16 in its entirety. (T V, 10-11). The Court again urged that the jurors consider the law on self defense as "kind of like a little check list that you can go down and apply the facts as you see them to that in term of an analysis of the facts and circumstances of this case." (T V, 11). The court provided additional instructions regarding deliberations, and the jury continued deliberating. (T V, 12-13). The defense desired reinstruction on the definition of "curtilage", and reminded the court that there is no duty to retreat if the defendant is in his own home. (T V, 14). The Court denied the request for additional definitions, believing that the current version of CJI2d 7.16 captured the concerns and was a correct statement of law. (T V, 14-16).

The jury returned later with additional requests for testimony and for a legal conclusion about whether Mr. Richardson perjured himself. (T V, 17). The jurors were told that the transcripts were being assembled, and that they would have to make their own conclusion about Mr. Richardson's testimony. (T V, 18-19).

Ultimately the jury convicted Mr. Richardson of one count of assault with intent to do great bodily harm as to complainant Brandy Abrams, one count of assault with intent to do great bodily harm as to complainant Denis Dinwiddie, and one count of felony firearm. (T V, 21-23). The jury

found Mr. Richardson "not guilty" of the alternately charged offenses of assault with intent to murder Ms. Abrams and Mr. Dinwiddie. (T V, 22-23).

Mr. Richardson appealed his convictions on the issues of insufficient evidence and judicial bias, which encompassed an instructional error for refusing to reinstruct the jury on the definition of "curtilage". Mr. Richardson's requests for bond pending appeal were denied by the trial court, the Court of Appeals, and this Court. *See generally*, Court of Appeals Docket Entry Numbers 17, 21, 37 and 44. Mr. Richardson's convictions were affirmed in an unpublished opinion issued by the Michigan Court of Appeals. *People v Richardson*, Michigan Court of Appeals Docket No. 291617 (July 27, 2010).

Mr. Richardson filed a *pro per* application for leave to appeal to this Court on September 15, 2010. On March 11, 2011, this Court ordered the Clerk to schedule oral argument on the application. *People v Richardson*, 488 Mich 1055 (2011). The parties were directed to brief the issue: "whether, under the circumstances of this case, it was proper to instruct the jury in accordance with CJI2d 7.16, which permits consideration of whether the defendant had a duty to retreat, see MCL §768.21c; *People v. Riddle,* 467 Mich. 116, 134, 141 n. 30, 649 N.W.2d 30 (2002)." The State Appellate Defender Office was appointed to represent Mr. Richardson on or about March 14, 2011.

SUPPLEMENTAL ARGUMENTS

I. THE JURY INSTRUCTIONS ON THE CONCEPT OF "DUTY TO RETREAT", AS A WHOLE, DID NOT ACCURATELY STATE THE LAW, DID NOT FAIRLY PRESENT THE ISSUES TO BE TRIED, DID NOT PROTECT MR. RICHARDSON'S RIGHTS, AND WERE UNNECESSARILY CONFUSING AND MISLEADING, REQUIRING REVERSAL OF MR. RICHARDSON'S CONVICTIONS.

ISSUE PRESERVATION: There was no objection to the original instructions at trial. (T III, 174). During reinstruction, substantial discussion concerned the concepts of self-defense, the definition of "home" and "curtilage", and how the law had changed at some point before trial. *See* Statement of Facts, *supra*. However, at no time did the defense make a specific objection to instructing the jurors that Mr. Richardson had a duty to retreat as a general rule. *See e.g.* Instructions at T III, 168; T V, 8, 10.

STANDARD OF REVIEW: This Court undertakes *de novo* review of jury instructions to determine whether, as a whole, the instructions were sufficient to protect the defendant's rights. *People v Aldrich*, 246 Mich App 101 (2001); *People v Moldenhauer*, 210 Mich App 158 (1995). *See also Estelle v McGuire*, 502 US 62, 72 (1991) (describing the standard for considering whether erroneous jury instructions deprived the defendant of his constitutional right to due process of law).

As a general rule, unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750 (1999). As set forth in Supplemental Issue II, *infra*, Defendant-Appellant asserts that Counsel's failure to object to the duty to retreat instruction constitutes a forfeiture of the instructional error. *People v Carter*, 462 Mich 206 (2000). Review is appropriate where the

issue concerns an erroneous instruction on self defense. *See e.g. Id.* 216 n.11 citing *People v Lenkevich*, 394 Mich 117 (1975).

ANALYSIS: The original instructions to the jury explained that Mr. Richardson had a "duty to retreat" as a general proposition of law when considering his self-defense claim. *See e.g.* CJI 2d 7.16; T III, 168: "If the Defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the Defendant honestly and reasonably believed he needed to use deadly force and self-defense." The jury was further instructed that "a person is never required to retreat if attacked in his or her own home, nor if the person reasonably believed that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden [fierce] and violent attack." *Id.* Essentially these same instructions were provided to the jurors again during what appears to be the third (of at least three[1]) days of deliberation. (T V, 8, 10).

Mr. Richardson herein supplements his original brief on appeal and application for leave to appeal, in accordance with this Court's directive, and asserts that the trial court erred by instructing the jurors that Mr. Richardson had a duty to retreat *at all*.

Mr. Richardson did not deny that he shot both Ms. Abrams and Mr. Dinwiddie multiple times. (*See e.g.* T III, 111). He testified that he did so because he feared for his life and that of his family. (T III, 115). The most serious charges he faced were two counts of assault with intent to murder. MCL §750.83. The firing of a gun constituted "deadly force" by definition under these circumstances. *Compare People v Hooper*, 152 Mich App 243 (1986) (finding an instruction on "non-deadly" force on such facts would be inappropriate). At trial, Mr.

[1] The jury began deliberating at 3:34 p.m. on Monday January 26, 2009 (T III, 177), and continued deliberations on Tuesday January 27, 2009 and Wednesday January 28, 2009 before reaching a verdict at approximately 4:30 p.m. on Thursday January 29, 2009 (T V, 21).

Richardson presented a claim of "self-defense" to his use of deadly force against Ms. Abrams and Mr. Dinwiddie.

In Michigan, the use of deadly force is justifiable if, considering all of the circumstances, the defendant "honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119 (2002)(internal citations omitted). In *Riddle*, this Court affirmed the common law concepts of self-defense and duty to retreat. In order for deadly force to be "necessary", the general rule is that the defendant must "try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *Id.*

There is no duty to retreat from a "sudden, violent attack", from a "sudden affray or chance medley" or, pursuant to the "Castle" Doctrine – when one uses deadly force in his own dwelling. *See generally Riddle, supra.* The "Castle" Doctrine makes clear that retreat is not a factor in determining necessity when deadly force is used in the accused's home:

> The rule has been defended as arising from "'an instinctive feeling that a home is sacred, and that it is improper to require a man to submit to pursuit from room to room in his own house.'" [] Moreover, in a very real sense a person's dwelling is his primary place of refuge. Where a person is in his "castle," there is simply *no safer place* to retreat.

Riddle, supra at 134-135 (emphasis in original).

In *Riddle*, this Court examined the duty to retreat before using deadly force in a driveway in an area between the home and detached garage. This Court concluded that, at common law, the "Castle" Doctrine was limited to the home itself, and did not extend to the "curtilage" or area surrounding the dwelling. *Id.* at 137-138. Since that decision in *Riddle*, the Michigan Legislature enacted the Self Defense Act, codified at MCL §780.981 *et. seq.* (effective October

1, 2006). The statute provides the right to use self defense with no duty to retreat if faced with imminent death or great bodily harm or imminent sexual assault:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.
>
> (b) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself or of another individual.
>
> (2) An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force by another individual.

The Legislature also codified the common law concept that there is no duty to retreat in one's home, and essentially extended the "Castle" doctrine to the curtilage or area surrounding the home:

> (1) In cases in which section 2 of the self-defense act [MCL 780.982] does not apply, the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in his or her own dwelling or within the curtilage of that dwelling.
>
> (2) As used in this section, "dwelling" means a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.

MCL §768.21c.

The incident in the instant case occurred in September of 2008, after the passage of these laws. Mr. Richardson was on the porch of his home at the time he used deadly force. A porch was considered part of the "dwelling" even under the common law version of the "Castle" doctrine. See *Riddle, supra* at 138 ("...the castle doctrine applies to all areas of a dwelling – be it a room within the building, a basement or attic, or an attached appurtenance such as a garage, porch or deck...") *See also People v Canales*, 243 Mich App 571, 576-577 (2000) (holding that "the porch is part of the home for purposes of the no retreat rule" and finding error where the court instructed the jury that the defendant had a duty to retreat from the porch of his home).

The codification of MCL §768.21c makes clear that Mr. Richardson had *no duty to retreat* where Ms. Abrams attacked Mr. Richardson while he was on his porch and while Mrs. Richardson was inside the home. It was error for the court to instruct the jury that they could consider Mr. Richardson's failure to retreat where the law requires exactly otherwise. This Court noted as much in *Riddle*:

> There might be circumstances in which an instruction permitting the jury to consider a defendant's failure to retreat would be improper; for instance, if the defendant was inside his dwelling when he was attacked or if the undisputed evidence established that he was suddenly and violently attacked. See, e.g., [*People v Macard*, 73 Mich 15 (1888)]. In such a case there would be no basis for an instruction allowing the defendant's failure to retreat to be considered in determining whether he acted in lawful self-defense.[]

Riddle, supra at 141 n.30.

Despite having *Riddle* in hand, the trial court reinstructed the jurors on self defense – including CJI 2.d 7.16 in total and almost verbatim: "If the Defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the Defendant honestly and reasonably believed he needed to use deadly force and self-defense....". (T III, 168; *see also* T V, 8, 10). Though the Court went on to explain that Mr. Richardson had no duty to retreat "if

attacked in his...own home" (T III, 168), the court urged the jurors to consider the instructions relating to self-defense like a "checklist" at both the beginning and end of the principles of law. T V, 7, 11 ("So if you look at that, it's kind of like a little check list that you can go down and apply the facts as you see them to that in terms of an analysis of the facts and circumstances of this case.") Using the Court's analogy to illustrate the problem, the jury was instructed that Mr. Richardson actually had a duty to retreat, imagined (in excerpt form) as follows:

- ☑ Honest and reasonable belief
- ☑ Proportionate response
- ☑ Immediately necessary
- ☑ Considered excitement of the moment
- ☑ Has a duty to retreat
- ☑ No duty to retreat if in home

Stated simply, Mr. Richardson had *no* duty to retreat before using deadly force because he was in his dwelling. MCL §768.21c; see also *Riddle, supra* at 137, citing *Pond v People*, 8 Mich 150 (1860). Instructing otherwise was error. To be sure, the *only* time the law imposes an affirmative obligation to retreat is "where a defendant-who is <u>not</u> in his `castle'-is voluntarily engaged in mutual, nondeadly combat that escalates into sudden deadly violence." *Riddle, supra* at 132 (emphasis added). This is the common law "sudden affray or chance medley" exception to the duty to retreat rule, and is specific to deadly force occurring outside of the accused's dwelling. No affirmative duty exists in any other context. *See e.g. Riddle, supra* at 132, 142 ("Conclusion").

It would be somewhat myopic to assume that the rote recitation of the entire instruction provided in CJI 2d 7.16 obviated any error. Including a "duty to retreat" in the "checklist" was

error itself despite being modified by the correct statement of law contained in the balance of CJI 2d 7.16, which reads in total (after *Riddle* and the Self Defense Act), as follows:

> (1) A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he / she] needed to use deadly force in self-defense.
> (2) However, a person is never required to retreat if attacked in [his / her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.
>
> (3) Further, a person is not required to retreat if the person -
>
> (a) has not or is not engaged in the commission of a crime at the time the deadly force is used, and
> (b) has a legal right to be where the person is at that time, and
> (c) has an honest and reasonable belief that the use of deadly force is necessary to prevent imminent [death / great bodily harm / sexual assault] of the person or another.

It is as much error to give an instruction which is not warranted by the evidence as it is to fail to give one that is. *See e.g. People v Crow*, 128 Mich App 477, 488-489 (1983) ("although the defendant was not entitled to an instruction informing the jury that, as a matter of law, he had no duty to retreat, we are equally satisfied that the prosecution was not entitled to an instruction to the jury that, as a matter of law, the defendant had a duty to retreat, given the circumstances of this case.")

In *People v Pace*, 102 Mich App 522 (1980), the Michigan Court of Appeals reversed the defendant's conviction for felonious assault where the trial court instructed the jury on *deadly* force in connection with a self defense claim, though there was no testimony supporting the idea that *deadly* force had been employed. *Id.* at 533. The Court was not persuaded by the prosecution's argument that any error was cured by the trial court's follow up instruction on the

use of *non*-deadly force in self-defense claims: "[N]othing in the nondeadly force instructions dispelled the idea that a perception of death or great bodily harm was a condition precedent to claiming self-defense. Where two instructions are given one proper and one improper it is presumed that the jury followed the erroneous one." *Id.* at 535, citing *People v Neumann*, 35 Mich App 193, 195-196 (1971) and *People v White*, 89 Mich App 726, 730 (1979). The *Pace* logic follows in the instant case where the Court described the law as a "checklist", with the duty to retreat being a prerequisite to any other consideration, such as "if" Mr. Richardson was in his own home when he was attacked.

The proper approach in the instant case would have been for the trial court to modify CJI2d 7.16 to eliminate any language suggesting that Mr. Richardson had an affirmative duty to retreat at all. There is no rule requiring that the standard jury instructions be read, much less be read *in total* where portions are not applicable to the facts of the case. *People v Petrella*, 424 Mich 221 (1985); *People v Stephan*, 241 Mich App 482, 495 n.10 (2000). The trial court is required to examine the standard instructions carefully before using them, "in order to ensure their accuracy and appropriateness to the case at hand." *Petrella, supra* at 277. Here, the Court did little more than select the correct pronouns for CJI 2d 7.16 with the hope that the jury would sort out the law. Mr. Richardson was entitled to have a properly instructed jury consider the evidence against him. *Riddle, supra* at 124. The jury was inaccurately told that he had a "duty to retreat" before using deadly force in self-defense. The duty to retreat instruction was more than error, it undermined Mr. Richardson's entire claim of self-defense and deprived him of a fair trial.

It is true that an erroneous instruction on the duty to retreat can be harmless. *See e.g. People v Garrett*, 82 Mich App 178 (1978). But there is no question that the erroneous

instruction in the instant case resulted in Mr. Richardson's convictions.[2] The jury expressed confusion very early about the definition of "home": "What is considered the Defendant's home to understand self-defense?" (T IV, 3). The confusion likely stemmed from multiple incorrect instructions. One obvious problem was that the original instruction tracked some of the outdated language in CJI2d 7.17: "If . . . the Defendant is assaulted in his own home, if someone forcefully *entered* the Defendant's *home*, the Defendant did not have to try to retreat and get away. Under those circumstances, the Defendant could stand his ground and resist the attack with as much force as he honestly and reasonably believed necessary at the time he needed to protect himself." (emphasis added) The court realized that instruction had been superseded (T IV, 5-6) and offered multiple options of "home or dwelling or within the curtilage of that dwelling" and defined "curtilage" consistent with the defense's request and in response to the jury's questions. (T IV, 16-17).

The more likely source of confusion was that the court seemed to allow for a combined legal and factual determination as to whether Mr. Richardson was in his own home despite clearly being in his "dwelling" within the meaning, spirit and definition of the law. *Riddle, supra; Pond, supra*; MCL §768.21c. Thus, the "checklist" approach proved particularly problematic where the jury was instructed that Mr. Richardson not only had an affirmative duty to retreat, but also that they needed to decide if he was legally entitled to any exception after they determined as a factual matter whether he was even in his own home. This broadened the issues for consideration and proved obviously confusing to a jury that could not manage to connect a

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[2] The fact that defense counsel argued that Mr. Richardson had no duty to retreat does not cure the error (*See e.g.* closing arguments at T III, 145), particularly when the trial court told the jurors to disregard any differing statements by the lawyers on the law and to follow the law only as given by the Court. (*See e.g.* T III, 150-151 "If a lawyer says something different about the law, you follow my instructions").

porch to a home *before* being inundated with unnecessary terms like "curtilage", "abode" and "appurtenant structure". (T IV, 16-17).

To establish "plain error" in instructing the jury on the duty to retreat, Mr. Richardson must not only establish error, but that the error is "clear and obvious." *People v Carines,* 450 Mich, at 763. He maintains that he satisfies these requirements as noted in *Riddle, supra* at 141 n.30 (observing that it would be error to instruct on the duty to retreat if the accused is in his dwelling when attacked). This error also affected his substantial rights and undermined the fairness of the proceedings. *Carines,* supra at 763. It was not as though the court made an isolated reference to his "duty to retreat". After the initial instructions the Court ***twice more*** re-explained that as a general rule Mr. Richardson was required to retreat along with the exceptions to that rule. (T III, 168; *see also* T V, 8, 10). This reinstruction was partially prompted by the jury's indication that it was having difficulty reaching a verdict, in which the court recognized that the concepts involving self defense were complex. So while the court *did* offer the law that the duty to retreat would not apply if the accused was in his dwelling, the court also made certain that "no one …[would be] under the impression…..that, if someone comes to someone's house or on their property and if they kill or use deadly force automatically that justifies and that's self-defense. The law is that you have to follow the rules of law and make an analysis as to whether or not those circumstances are such that fit or justify self-defense." (T V, 8). This contradictory language served only to reinforce the erroneous proposition that Mr. Richardson had a duty to retreat in the first place. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v United States*, 326 US 607 (1946). After receiving these instructions, the jury could have never seen past Mr. Richardson's failure to retreat in assessing his self-defense claim.

It is no small matter that this jury spent at least three days deliberating over evidence and law that comprised less than two days of trial and even once reported being "hung" (T V, 3) before eventually settling upon the lesser included offenses of assault with intent to do great bodily harm less than murder. (T V, 21-23). A properly instructed jury would have had little trouble acquitting Mr. Richardson of all crimes.

Plain error occurred here and a new trial is required.

II. MR. RICHARDSON DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL DUE TO COUNSEL'S FAILURE TO OBJECT TO ERRONEOUS AND HIGHLY PREJUDICIAL JURY INSTRUCTIONS.

ISSUE PRESERVATION: There is no requirement that this issue be preserved by an objection at trial, but there is a need to raise the issue initially in the trial court if there are facts not of record. *People v Mitchell*, 454 Mich 145 (1997); *see also People v Ginther,* 390 Mich 436 (1973). This specific issue was not part of the original appeal and is not preserved for appellate review. Defendant-Appellant asks that this Court grant leave to appeal on this particular issue and order full briefing by the parties to address this important, but unpreserved claim.

STANDARD OF REVIEW: Claims of ineffective assistance of counsel are generally reviewed *de novo*. *People v Pickens,* 446 Mich 298, 359 (1994). Even without a hearing, Defendant-Appellant maintains that the attorney's deficient performance and prejudice can be resolved within the four corners of the lower court record.

ANALYSIS: A fundamental component of our criminal justice system is an accused's right to be represented by counsel at every critical stage of the proceedings. *Powell v Alabama,* 287 US 45 (1932). The federal and state constitutions guarantee an accused the right to the assistance of counsel. US Const. Am. VI; Mich Const 1963, art 1, § 20. A criminal defendant has a constitutional right to counsel at every stage of the proceedings where his rights may be affected. *Coleman v Alabama,* 399 US 1 (1970); *People v Hammerquist,* 107 Mich App 771 (1981). This is a right not just to be represented, but to be "assisted" for what is, after all, the accused's, and not counsel's, trial. *United States v Cronic,* 466 US 648, 654 n.22 (1984).

The United States Supreme Court's standard for reviewing ineffective assistance claims is set forth in *Strickland v Washington,* 466 US 668 (1984). This Court has adopted these standards in reviewing the similar Michigan Constitutional protections. *People v Pickens*, 446 Mich 298 (1994).

The *Strickland* standard for judging ineffective assistance of counsel has two components: performance and prejudice. The *Strickland* Court held that there was no more specific standard of performance than whether counsel's assistance was "deficient, falling below an objective standard of reasonableness" *Pickens, supra* at 341. The second component of an ineffective assistance of counsel claim is prejudice, that is, "counsel's representation fell below an objective standard of reasonableness," and actual prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable...." *Id.*

The *Strickland* Court explicitly rejected an "outcome determinative" test, i.e. "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. In so doing the Court reasoned that the outcome of a case which includes deficient conduct is less entitled to a presumption of accuracy and fairness.

As set forth in Supplemental Issue I, *supra*, counsel made no objection to the original instructions at trial. (T III, 174). During reinstruction, substantial discussion concerned the

concepts of self-defense, the definition of "home" and "curtilage", and how the law had changed at some point before trial. *See* Statement of Facts, *supra*. However, at no time did the defense make any objection to instructing the jurors that Mr. Richardson had a duty to retreat as a general rule. *See e.g.* Instructions at T III, 168; T V, 8, 10.

Specifically, at the conclusion of the original instructions – which included an affirmative duty to retreat – counsel answered "No, your Honor" when asked if there was anything to bring to the court's attention about the instructions. (T III, 174). When defining the term "home" (or "curtilage", or "dwelling"...), the defense indicated that it was "pleased with the instructions" (T IV, 20) though at that point there was no further mention of the duty to retreat as set forth in CJI2d 7.16. There was some objection to the reinstruction (which included the duty to retreat language) during the third day of deliberations, but not on the point set forth in Supplemental Issue I, *supra*; T IV, 14-16.

As set forth in Supplemental Issue I, Mr. Richardson had no duty to retreat because he was in his dwelling. The instructions that included an affirmative duty, no matter how modified, constituted an incorrect statement of law. *See Riddle, supra* at 141 n.30; *see also* MCL §768.21c. Counsel's failure to object to such obvious error constitutes deficient performance on the facts of this case, because the court should have never instructed on an affirmative duty to retreat at all. Counsel added to the problem by encouraging a definition of "curtilage" that defined that term to include the "porch" (T IV, 13) when case law clearly provided that the "porch" was part of the "dwelling". *Riddle, supra* at 138; *Canales*, supra at 576-577. No one seemed to notice that the definitions were inconsequential after the Self Defense Act – which is particularly troubling given that both the court and defense counsel were reading from the relevant provisions of the Act and the updated jury instructions when determining how to instruct the jurors in accordance with the current state of the law. *See generally* T IV.

Mr. Richardson was prejudiced by counsel's failure to object to the instructions because the instructions themselves were erroneous and misleading, evidenced by substantial confusion from the jury. *See* Supplemental Issue I, *supra*, incorporated herein. Had counsel objected to the erroneous instruction, the jury would have never been told (three times, no less, T III, 168, T V, 8, 10) that Mr. Richardson had a duty to retreat before using deadly force. A verdict after protracted deliberations on the lesser offenses of "assault with intent to do great bodily harm" serves to underscore the prejudice from counsel's deficient performance.

Reversal is required.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated herein, Defendant-Appellant asks that this Court REVERSE his convictions, and/or GRANT the within Application for Leave to Appeal and/or grant any other relief this Court deems just.

Respectfully submitted,

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